Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
12/09/2009 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2009-000676-001 DT 12/04/2009

JUDGE PRO TEM EARTHA K. WASHINGTON

CLERK OF THE COURT
T. Pavia
Deputy

STATE OF ARIZONA

KENDRA L OWENS

v.

RILEY EAMON NOKES (001)

CARI M MCCONEGHY-HARRIS

REMAND DESK-LCA-CCC
SCOTTSDALE CITY COURT

RECORD APPEAL RULE / REMAND

Lower Court Appeal No. TR2008038721

This Court has jurisdiction over this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. § 12-124(A). The Court has considered the record of the proceedings from the trial court, exhibits made of record, and the memoranda submitted.

The issue on appeal is whether the trial court committed reversible error by failing to dismiss the appellant's case after he alleged that his constitutional right to counsel had been violated by the arresting officer.

A hearing on the appellant's motion to dismiss was held by the trial court on March 25, 2009. The appellant, through trial counsel, called the arresting officer, Officer Brunjes to the stand as witness. The officer testified that he was dispatched to the appellant's location after receiving information that the appellant was driving his vehicle while impaired. The officer contacted the appellant while he was in the drive through lane of a restaurant. After questioning the appellant the officer began a DUI investigation and eventually arrested him on DUI charges. After the arrest the officer read the appellant the Admin Per Se form (pursuant to A.R.S. § 28-132-implied consent statute) and then drove him to a hospital so a blood draw could be performed. The

appellant had consented to having his blood drawn pursuant to the implied consent statute. After the blood draw the officer tried reading the appellant his Miranda rights. While reading his rights, according to the officer, the appellant continued interrupting by stating "Speak to my lawyer." After reading the rights the officer asked the appellant if he would answer questions and the appellant said he would not. He then drove the appellant to the jail, once there he reminded him that Miranda still applied and asked if would talk about the green leafy substance that was found on his person. In response to the officer's question, the appellant said "That's a question to ask my lawyer." The officer was asked if the appellant ever requested a lawyer prior to Miranda being read and the officer replied that he could not recall. On cross examination by the State the officer said that after the Miranda warnings were given the appellant never asked to speak to a lawyer. The officer said he wrote the police report of his contact with the appellant on the night it occurred. The officer said the appellant never requested a lawyer during the blood draw and that he never specifically asked for a lawyer either before or afterwards. On redirect the appellant got the officer to admit again that he could not recall if a request for a lawyer was made prior to the Miranda warnings being read.

The appellant testified and said he had made three separate requests for an attorney that was ignored by the officer. The appellant said he made his first request when he realized he was being arrested and made two requests for an attorney before the blood draw was performed. On cross examination the appellant admitted to having consumed four to five alcoholic drinks (mixed drinks and beer). He said he remembered his contact with the officer because he considered it a traumatic event. Although he felt the alcohol gave him an elevated mood at the time, he said that he felt fine and that his memory was not affected because of it; he also denied to having stumbled when getting out of his vehicle. After asking for a lawyer so many times the appellant said began to respond to the officer by saying "Talk with my lawyer" and "Speak with my lawyer." On redirect he reiterated that he asked to speak with a lawyer before the blood draw. In response to the trial court's question the appellant said that when he realized he was being arrested he said he "would like to speak with an attorney." The appellant also said he got confused before the blood draw about the lack of options he had in testing his BAC and again asked to speak to a lawyer but was turned down by the officer.

In closing arguments the appellant's counsel said that the case should be dismissed because the officer ignored specific requests from the appellant to talk with a lawyer. The State argued in its closing that the case came down to credibility of the officer's and the appellant's testimony. The State said that the appellant's credibility was questionable due to his high BAC (.215) which it claimed affected his ability to recall his contact with the officer. The State said that the officer testimony was credible when he said that the appellant never made a specific request for counsel. The trial court agreed with the State that the issue came down to credibility and said it believed that the officer's testimony was more credible. After reviewing the appellant's testimony, which was recorded as part of the hearing, the trial court said that he never testified on direct

examination to having made a specific request for counsel. The trial court said the appellant's testimony suffered from credibility problems due to his high BAC, his "three inch sway" observed by the officer, his blood shot watery eyes, the strong odor of alcohol emanating from his breath and his admission to having consumed four to five drinks. The trial court said also said that after observing the two testify, it found that the officer's testimony was more credible. Based on its findings and observations the trial court denied the appellant's motion to dismiss.

> We review for abuse of discretion a trial court's ruling on a motion to dismiss criminal charges, but questions of statutory interpretation and constitutional law are reviewed de novo. *State v. Ramsey*, 211 Ariz. 529, ¶ 5, 124 P.3d 756, 759 (App.2005). "A trial court abuses its discretion when it misapplies the law or predicates its decision on incorrect legal principles." *State v. Jackson*, 208 Ariz. 56, ¶ 12, 90 P.3d 793, 796 (App.2004).[1] We defer to the trial court's factual findings that are supported by the record and not clearly erroneous. *Id*. at ¶ 7 n. 1; *Mack v. Cruikshank*, 196 Ariz. 541, ¶ 6, 2 P.3d 100, ¶ 6 (App.1999).[2] "A knowing and intelligent waiver of *Miranda* rights may be shown by a suspect's conduct when he answers questions after the police give proper warnings. *State v. Tapia*, 159 Ariz. 284, 286-87, 767 P.2d 5, 7-8 (1988). Waiver of the right to counsel once invoked depends on the facts and circumstances of each case, including the background, experience, and conduct of the accused. *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S.Ct. 1880, 1883, 68 L.Ed.2d 378 (1981). The minimum required for invoking the right to counsel is a statement that shows a desire for an attorney during custodial interrogation. *McNeil v. Wisconsin*, 501 U.S. 171, 111 S.Ct. 2204, 2209, 115 L.Ed.2d 158 (1991). If the request is ambiguous, the police must cease questioning or attempt to clarify the request. *State v. Staatz*, 159 Ariz. 411, 414, 768 P.2d 143, 146 (1988). Comments such as "maybe I should be talking to a lawyer" or "maybe it would be in my best interests to speak to a lawyer" have been held sufficiently ambiguous as to require clarification, even if not a clear invocation of the right to counsel. *Id*. at 414, 768 P.2d at 147."[3]

The trial court's finding of some facts in this case are not supported by the record and was clearly erroneous; the trial court relied on evidence that had not been admitted at the suppression hearing or stipulated to as true by the parties in their motion pleadings. No evidence was ever introduced by the appellant or the officer that at the time of contact the appellant had a "three inch sway" and blood shot watery eyes, the trial court appears to have gotten those facts from the State's pleading or another source. The trial court's ruling on the credibility of the witnesses'

[1] *State v. Mangum*, 214 Ariz. 165, 167, 150 P.3d 252, 254 (Ariz.App. Div. 2, 2007).
[2] *State v. Rosengren*, 199 Ariz. 112, 116, 14 P.3d 303, 307 (Ariz.App. Div. 2, 2000). See also, *Lee Development Co. v. Papp*, 166 Ariz. 471, 803 P.2d 464 (Ariz.App., 1990) (We are bound by the trial court's findings of fact unless they are clearly erroneous, giving due regard to the opportunity of the trial court to view evidence and weigh the credibility of witnesses.).
[3] *State v. Thornton*, 172 Ariz. 449, 453, 837 P.2d 1184, 1188 (Ariz.App. Div. 1, 1992).

testimony was also in error in that it incorrectly considered the weight to be given to the testimony regarding the request for counsel.

> An answer by a witness that he does not remember whether an event occurred is not a denial that the event did not occur. Such an answer does not contradict the defendant's positive assertion [**when he said he had asked three times to speak to an attorney and the officer said he could not recall if the request had been made prior to the Miranda warnings being read to him**]. The defendant's testimony is unimpeached, either by the [officer's] testimony or other testimony or circumstances in the case. It should have been accepted at face value.[4]

Additionally the officer had a duty at a minimum, pursuant to *Staatz,* to cease questioning of the appellant an attempt to clarify what he meant by saying "Speak with my lawyer," "Talk with my lawyer." The officer's failure to clarify what he recalled hearing from the appellant about a lawyer acted to deny the right to counsel the appellant is guaranteed under the law.

Because violation of the appellant's right to counsel occurred, the trial court must decide on remand whether dismissal is the appropriate remedy.

> [O]nly when police conduct interferes with both the defendant's right to counsel and his ability to obtain exculpatory evidence is "[d]ismissal of the case with prejudice ... the appropriate remedy because the state's action foreclosed a fair trial by preventing [the defendant] from collecting exculpatory evidence no longer available." *McNutt*, 133 Ariz. at 10, 648 P.2d at 125. Correspondingly, when the interference with the defendant's right to counsel does not impinge upon his ability to collect exculpatory evidence, the appropriate remedy is suppression. This dichotomy is predicated upon statutory (A.R.S. § 28-692(H)) and constitutional due-process grounds which guarantee a DUI suspect the right to obtain an independent blood test. *See Montano v. Superior Court*, 149 Ariz. 385, 389, 719 P.2d 271, 275 (1986); *Smith v. Cada*, 114 Ariz. 510, 511-13, 562 P.2d 390, 391-93 (App.1977).[5]

IT IS THEREFORE ORDERED reversing in part the trial court's ruling on the motion and remanding the matter for further proceedings consistent with this decision.

[4] State v. McFall, 103 Ariz. 234, 439 P.2d 805 (Ariz., 1968).
[5] State v. Keyonnie, 181 Ariz. 485, 487, 892 P.2d 205, 207 (Ariz.App. Div. 1, 1995).